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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 2000

ROCKEY J. REED,
Captain, United States Marine Corps,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the loss of over $700,000.00 in military retirement benefits an unconstitutional excessive fine under the Eighth Amendment if it is punishment resulting from a court-martial conviction for theft of a $145.00 Government computer modem and related false official statements?

PARTIES TO THE PROCEEDINGS IN THE LOWER COURTS

The caption of the case contains the names of all parties to the proceedings in the lower courts and here.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Captain Rockey J. Reed, U. S. Marine Corps, respectfully requests that the Honorable Justices of the Supreme Court of the United States grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces rendered in his case on August 31, 2000. In support of his request, Captain Reed sets forth the following:

CITATION TO THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces which is the subject of this Petition is United States v. Reed, 54 M.J. 37 (2000), and is set forth as Appendix A. The opinion of the Navy-Marine Corps Court of Criminal Appeals is United States v. Reed, 51 M.J. 559 (N.M.Ct.Crim. App. 1999), and is set forth as Appendix B.

STATEMENT OF THE BASIS FOR JURISDICTION

The opinion of the United States Court of Appeals for the Armed Forces affirming Captain Reed's conviction and sentence was entered on August 31, 2000. Jurisdiction to review the Court of Appeals' opinion by writ of certiorari is conferred by Title 28 of the United States Code, Section 1259(3) (2000).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in the case is the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

STATEMENT OF THE CASE

A. Basis for Federal Review in the First Instance.

Captain Reed, as an active duty Marine Corps officer, was tried by a military court-martial and his case has proceeded through the appellate courts established to hear appeals of court-martial convictions.

B. Procedural History.

Captain Reed was tried by general court-martial, military judge alone, between May 20-22, 1996. While represented by detailed (appointed) counsel, he entered pleas of not guilty to charges of larceny of a modem of a value of $145.00 in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921 (1995); two false official statements related to the alleged larceny[1] in violation of Article 107,

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[1] The substance of the alleged false statements were that a box of equipment was placed in a particular office for approximately two months, and that he purchased a modem from a former Navy Chief Petty Officer that he met at the Navy and Marine

Uniform Code of Military Justice, 10 U.S.C. § 907 (1995); and conduct unbecoming an officer in violation of Article 133, Uniform Code of Military Justice, 10 U.S.C. § 933 (1995). The military judge convicted Captain Reed of the larceny and false statement charges, and dismissed the conduct unbecoming charge. He was sentenced to be dismissed from the service. The Convening Authority approved the sentence as adjudged.[2] The United States Navy-Marine Corps Court of Criminal Appeals affirmed the findings and sentence as approved on May 18, 1999. United States v. Reed, 51 M.J. 559 (N.M.Ct.Crim.App. 1999). On August 31, 2000, the United States Court of Appeals for the Armed Forces affirmed the convictions and sentence. United States v. Reed, 54 M.J. 37 (2000).

C. Material Facts.

In 1994, Captain Reed was the Inspector-Instructor for Electronic Maintenance Company, 4th Maintenance Battalion, 4th Force Service Support Group, located in Wichita, Kansas. See Prosecution Exhibit 20. At the time of trial, Captain Reed had served for 19 years and three months on active duty, see Record at 559, nine of those years as an enlisted Marine. See

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Corps Reserve Center, Wichita, Kansas ("Reserve Center").

[2] It is important to note that the Convening Authority considered this case a minor one. This is demonstrated by the offer to Captain Reed to process the case outside the court-martial system by nonjudicial punishment under Article 15(b), UCMJ, on two occasions — once before the Article 32 investigation and once after charges were referred. The Convening Authority could not have adjudged a dismissal or any punishment constituting such a severe financial penalty at nonjudicial punishment. See M.C.M., Part V, ¶ 5b(1)(B).

Prosecution Exhibit 20. He was within months of being eligible to draw retirement pay and benefits at the twenty year point. See 10 U.S.C. § 6323 (2000). His record was exemplary. Record at 436-88; See Defense Exhibit C (service record); Clemency Request of 6 November 1996, Enclosures (6)-(33) (letters from character witnesses). At the time of filing this Petition, Captain Reed has served well over twenty years.

During the relevant time frame, Marine Forces Reserve was updating the computer capability of its units throughout the United States. Record at 133. Testimony indicated that a new modem had been sent to Captain Reed's unit in Wichita. Record at 252. However, an extensive search did not discover the new modem. Record at 262. The modem was valued at $145.00. Record at 394.

Although the unit first sergeant recommended against it, Record at 117, Captain Reed took his personal modem to the Reserve Center for his unit to use. Record at 262. The modem was the same make as the missing modem, but a different model. Prosecution Exhibit 1; Prosecution Exhibit 5; Article 32 Investigative Exhibit 27, Enclosure 13. Captain Reed had a history of using personal equipment at the office in order to get the work done. Record at 132-34.

While the matter was still under investigation, Captain Reed was transferred to battalion headquarters in Charlotte, North Carolina. Record at 165. While Captain Reed was gone, a package addressed to him arrived at the Reserve Center in Wichita. Record at 182. The package contained a modem of the same type as the missing Marine Corps modem (Hayes Accura 144 model 5300, version 4.1), with an unsigned note apologizing for taking it and causing problems for Captain

Reed. Record at 186-88; Prosecution Exhibit 19; Prosecution Exhibit 2A.

The Government argued at trial that Captain Reed had taken the Marine Corps modem from the Reserve Center to his home, and then, after it was discovered to be missing, brought the same Marine Corps modem to work, falsely claiming it was his personal property. Record at 515-35. The Government's theory was that Captain Reed thought no one would learn of the arrival of the modem, but then his theft was discovered, and an elaborate cover-up ensued. Id. To support his claim that some unknown person had taken the Marine Corps modem, the theory went, Captain Reed then bought an identical one, drove to Oklahoma City, and mailed it with an anonymous note. Id.

Captain Reed introduced evidence of his good military character from four witnesses, who attested to both his truthfulness and honesty. Record at 436-88. Captain Reed did not testify during the court-martial.

The conduct unbecoming charge was dismissed when the Government rested, Record at 436, but at the conclusion of trial, Captain Reed was convicted of the other charges. Record at 551. His sentence was dismissal from the Marine Corps. Record at 565.

Because Captain Reed would be eligible to retire at age 41, Prosecution Exhibit 20, with a life expectancy of 72 years, the anticipated lifelong retirement pay he could have expected to receive as a retired captain with over twenty years of service exceeded $700,000.00.[3] Clemency Request of 6 November 1996, Enclosure (2). Of almost as much significance as the

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[3] This figure has not been challenged.

retirement pay is the anticipated value of retirement medical benefits, especially for his daughter Sarah, who was 13 years old at the time of trial. Sarah suffers from chronic heart problems, chronic asthma, and psychological problems stemming from abuse which occurred in the United States while Captain Reed was deployed overseas. Clemency Request of 6 November 1996, Enclosures (3)-(5).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

REASON I

THE COURT OF APPEALS FOR THE ARMED FORCES HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, SPECIFICALLY, UNITED STATES V. BAJAKAJIAN, 524 U.S. 321 (1998) AND AUSTIN V. UNITED STATES, 509 U.S. 602 (1993).

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASON I

The Court of Appeals failed to apply the correct analysis as set forth by this Honorable Court in deciding whether captain Reed's loss of retirement benefits is a fine. The Eighth Amendment to the United States Constitution prohibits excessive fines. U.S. CONST. amend. VIII. The Excessive Fines Clause limits the government's power to extract payments, whether cash or in kind, as punishment for a criminal offense. Austin v. United States, 509 U.S. 602, 609

(1993). This Honorable Court recently applied the Excessive Fines Clause and set forth the appropriate analysis courts must use in determining whether a forfeiture constitutes an unconstitutional fine. United States v. Bajakajian, 524 U.S. 321 (1998). Under the Bajakajian analysis, this Court must first determine if the forfeiture is in fact a fine, and if it is a fine, the Court must then determine whether it is excessive. Id. at 327-28, 334.

A. Existence of a Fine.

With respect to the first prong, this Court has stated that, "Forfeitures — payments in kind — are thus 'fines' if they constitute punishment for an offense." Id. at 328. The appropriate analysis to determine whether a forfeiture is punishment consists of examining its intended purpose. If the government intends in part to punish, then the forfeiture is a fine. Austin v. United States, supra, at 610; see United States v. Bajakjian, supra, at 333 (because "the Government has sought to punish respondent by proceeding against him criminally, in personam, . . . the forfeiture is punitive."). An intent to punish is seen when a forfeiture seeks retribution or deterrence, as opposed to serving a remedial purpose. Austin v. United States, supra, at 610. This Court recently applied this factor by noting that:

> [d]eterrence. . . . has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss. . . .
> Even if the Government were correct in claiming that the forfeiture of respondent's currency is remedial in some way, the forfeiture

> would still be punitive in part. (The Government concedes as much.) This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause.

United States v. Bajakjian, supra, at 329 and n.4. The Court further found the civil forfeiture at issue was only "imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony . . ." Id. at 328. Applying these factors, the forfeiture constituted a fine. Id. at 334.

Another factor the Court examines to determine whether the forfeiture is punishment is its effect on the individual. Austin v. United States, supra, at 610-11; see Browning-Ferris Indus. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989).

B. Excessiveness of the Fine.

With respect to the excessiveness analysis, this Court stated that "a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." United States v. Bajakajian, supra, at 334.

C. The Court Below Failed to Apply the Correct Analysis.

1. Existence of a Fine

Despite the well-established case law discussed above, the Court below failed to conduct the proper analysis in deciding the issue. The Court of Appeals did not examine the purpose of the forfeiture and its effect on Captain Reed to

determine whether retribution, deterrence, or a remedial purpose was involved. Instead, the Court of Appeals merely mechanically recited the fact that "loss of retirement benefits" is not expressly listed as an "authorized punishment" in the Uniform Code of Military Justice or the Manual for Courts-Martial. Based on this, and the fact that "historically, we have not found the loss of retirement benefits due to a punitive discharge to be punishment for an offense," but rather a "collateral consequence of a sentence," the Court of Appeals determined that no fine was involved. United States v. Reed, supra, 54 M.J. at 45. However, Captain Reed's impending forfeiture of retirement pay is a direct result of the Government's punishment of him for a criminal offense, is intended to exact retribution and deter, and serves no remedial purpose. It is therefore a fine under the Excessive Fines Clause.[4]

Contrary to the lower court's assertion, the principle that a loss of retirement benefits is not collateral to a sentence is well established in the military courts. The Court below itself recently stated, "[w]hen, as in this case, an accused is 'knocking at retirement's door,' the impact of a punitive discharge on retirement benefits is not irrelevant or collateral."

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[4] It is interesting to note that the opinion of the United States Court of Appeals for the Ninth Circuit in Bajakjian held that because the forfeiture at issue was not an instrumentality of the crime, it was unconstitutional under the Eighth Amendment's Excessive Fines Clause. United States v. Bajakjian, supra, 524 U.S. at 326. This Court agreed that it was not an instrumentality of the crime but did not base its decision on this issue. Id. at 334 n.9. In the case at bar, clearly the loss of retirement benefits is not an instrumentality of larceny or false statements.

United States v. Stargell, 49 M.J. 92, 93 (1998) (citing United States v. Becker, 46 M.J. 141, 144 (1997)) (emphasis added).

In addition, an officer who is dismissed from the service after a court-martial conviction automatically loses the right to receive retirement pay, notwithstanding the fact that he served the required number of years prior to the dismissal. Hooper v. United States, 326 F.2d 982, 988 (Ct. Cl. 1964); United States v. Sumrall, 45 M.J. 207, 211 (1996), cert. denied, 519 U.S. 1117 (1997). Therefore, although 10 U.S.C. § 6323, the statute governing military retirement, states that the President may exercise discretion in retiring an officer who has met all other requirements, in the case of a dismissed officer, there is no such discretion. Id. Contrary to the Court of Appeals' assertion, the automatic loss of retirement benefits under this scheme cannot fairly be described as a potential adverse consequence unrelated to the punishment for a criminal offense. United States v. Reed, supra, 54 M.J. at 45 ("At issue is a civilian statute and the decision to retire an officer rests with his service Secretary, not with a court-martial.").

It is emphasized that the United States Court of Appeals for the Armed Forces itself has stated that members of a court-martial (jurors) are to receive an instruction from the judge during the sentencing phase of trial explaining the impact of a punitive discharge or dismissal on retirement benefits. United States v. Greaves, 46 M.J. 133 n.2 (1997). How then can it be claimed that loss of retirement benefits is not a part of a court-martial sentence? If it must be considered by the sentencing authority when adjudging a sentence, then it follows that loss of retirement benefits is part of the punishment after conviction of a crime.

2. Excessiveness of the Fine

Furthermore, despite finding that "the sentence seems severe for larceny of $145 and two false official statements," the Court of Appeals did not proceed to the second prong of the Bajakajian analysis to determine proportionality. Id.

The unconstitutional forfeiture in United States v. Bajakajian, supra, was approximately 35 times greater than the base amount of the offense, which pales in comparison to the case at bar, where the $700,000.00 forfeiture is over 4,800 times greater than the alleged loss. Clearly, an unsuspended dismissal that results in the loss of over $700,000.00 in retirement benefits for the relatively minor offenses of theft of a $145.00 modem and subsequent related false official statements, especially considering Captain Reed's exemplary record for almost 20 years, is clearly more grossly disproportionate than was the excessive fine in United States v. Bajakajian.

To further demonstrate the disproportionality of Captain Reed's sentence, it is inconceivable that a civilian jurisdiction would impose such a severe punishment for the theft of a $145.00 item. Rather, Captain Reed's conviction for the theft would have been resolved as a misdemeanor if tried in a civilian court.[5] See generally W.R. LAFAVE AND A.W. SCOTT,

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[5] By way of example, had the local civilian authorities in Wichita prosecuted Captain Reed, the theft of property worth $145.00 would have been classified as a Class A nonperson misdemeanor, with a maximum punishment of one year confinement in the county jail and a fine not to exceed $2,500.00, or both. K.S.A. §§ 21-3701(a)(3), 21-4502(1)(a) and 21-4503a(b)(1) (1997) (emphasis added). A monetary punishment of nearly three-quarters

CRIMINAL LAW, sections 1.6-1.7 (Student ed. 1986). The sentence for this offense could have included a suspended sentence, probation, and restitution. Id. Based on counsel's experience litigating criminal cases in civilian courts in many states, it is also unlikely that charges similar to the specifications alleging false official statement would even be prosecuted in civilian misdemeanor courts.

The superficial inquiry by the court below is similar to those cases decided prior to this Court's decision in Austin that held that the Eighth Amendment was limited to criminal actions and could not apply to a civil forfeiture. In Austin, this Honorable Court made it quite clear that, contrary to the Government's argument, the Excessive Fines Clause is not limited to criminal prosecutions:

> "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law". . . . Thus, the question is not, as the United States would have it, whether forfeiture . . . is civil or criminal, but rather whether it is punishment.

Austin v. United States, supra, 509 U.S. at 610.

The Court of Appeals' failure to conduct the proper analysis regarding whether the loss of retirement benefits is a fine governed by the Eighth Amendment, and then to examine proportionality if it determined a fine was involved, was in conflict with decisions of this Honorable Court. Therefore, the

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of a million dollars for this offense would be unheard of, to say the least.

Court should grant the Petition for Writ of Certiorari to ensure that lower courts follow its precedent.

REASON II

THE COURT OF APPEALS FOR THE ARMED FORCES DID NOT USE THE CORRECT ANALYSIS TO DETERMINE THE EXISTENCE OF A FINE, CAUSING ITS DECISION TO CONFLICT WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS AND A STATE COURT OF LAST RESORT.

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASON II

Several United States Courts of Appeals and a state court of last resort have had occasion to determine whether a forfeiture constituted an excessive fine under the Eighth Amendment since the decision of this Court in United States v. Bajakajian, supra. All of them, regardless of the final determination either on the issue of whether it was a fine or whether it was excessive, have consistently applied the analysis as explained above. They conflict with the analytical procedure used in the case at bar by the Court of Appeals for the Armed Forces.

For example, the Court of Appeals for the Eighth Circuit examined in rem civil penalties under the Anti-Kickback Act and noted that it was intended in part to punish. United States v. Lippert, 148 F.3d 974, 977 (8th Cir. 1998). Furthermore, the legislative history indicated deterrence as one of the purposes of the Act. Id. Because of some

language from United States v. Bajakajian that it found ambiguous regarding in rem civil forfeitures, the Court of Appeals did not make a final ruling as to whether the forfeiture was a fine for Eighth Amendment purposes. Nevertheless, it determined that if it were a fine, it would not be "constitutionally excessive." Id. at 978.

The Court of Appeals for the Ninth Circuit has used the Austin and Bajakajian teachings to determine that mandatory deductions taken from income that inmates received from outside sources was a fine under the Eighth Amendment. Wright v. Riveland, 219 F.3d 905, 915 (9th Cir. 2000). The Court of Appeals found that the deductions served "the traditional goals of deterrence and [were] therefore punishment." Id. at 915. The Court of Appeals remanded to the district court for a determination on the excessiveness issue. Id. at 919.

Finally, the Supreme Court of Iowa relied on the relevant holdings of this Court to determine that payments made pursuant to a statutorily mandated victim restitution scheme served retributive and deterrent and not solely remedial purposes, and therefore constituted a fine under the Excessive Fines Clause. Iowa v. Izzolena, 609 N.W.2d 541, 549 (Iowa 2000). "Thus, the focus of the clause is on the impact of the punishment to the individual." Id. The Iowa Supreme Court then applied the proportionality test and found that the fine was not constitutionally excessive. Id. at 551.

In sum, courts across the nation have applied the analysis set forth by Austin v. United States and United States v. Bajakajian, specifically, examining whether the purpose of the forfeiture is to punish (provide deterrence or retribution) as opposed to serving remedial functions, and thus is a fine; then

examining the proportionality of the forfeiture with respect to the offense. However, the Court of Appeals for the Armed Forces did not address any of the relevant factors in making its determination that the loss of retirement benefits was not a fine. Therefore, the opinion of the Court of Appeals for the Armed Forces is in conflict with other United States Courts of Appeals and a state court of last resort, and this Honorable Court should grant the Petition for Writ of Certiorari.

REASON III

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

ARGUMENT AND AUTHORITIES IN SUPPORT OF REASON III

This Court has never addressed the issue presented in the instant case — whether the loss of military retirement benefits as a result of a court-martial conviction is a fine. Members of the armed forces serve around the world, and many are subject to the same loss of retirement benefits that Captain Reed is facing if they receive a discharge that causes them to forfeit their retirements, even after serving the required twenty years of active service. See Hooper v. United States, supra, 326 F.2d at 988. Before United States v. Bajakajian, supra, military courts consistently denied relief without conducting the analysis now required by this Court. See, United States v. Sumrall, supra, 45 M.J. 207; United States v. Lee, 43 M.J. 518 (A.F.Ct.Crim.App. 1995), aff'd, 46 M.J. 123 (1996), cert. denied, 519 U.S. 1117 (1997). The instant case is the first time

the Court of Appeals for the Armed Forces has done so since United States v. Bajakajian. United States v. Reed, supra, 54 M.J. at 44-45.

Furthermore, civilian courts have addressed the military retirement issue without applying the appropriate legal tests set forth by decisions of this Court. See, e.g., Seaver v. Commandant, United States Disciplinary Barracks, 998 F. Supp. 1215 (D. Kan. 1998).

The need for this Court to resolve the issue of whether the loss of retirement benefits is a fine is clear, especially considering the fact that the Court of Appeals for the Armed Forces itself has criticized situations like the one in the case at bar. See, e.g., the majority opinion in United States v. Sumrall, supra, at 211 n.3 ("something should be done about the problem in the military justice system where the effect of the court-martial sentence for a crime inevitably triggers a huge loss in retirement pay"); in the case at bar, United States v. Reed, supra, 54 M.J. at 45 (Sullivan, J., concurring) ("I remain convinced that a new option should be added to the list of possible punishments that a court-martial may consider a discharge with no or partial loss of retirement benefits. This new punishment option would allow better and more flexible justice in our military justice system."); United States v. Ives, 45 M.J. 22 (1996) (Sullivan, J., dissenting from denial of petition for grant of review) ("I respectfully dissent from the law I must apply in this case, and I hope my dissent will call attention to what I perceive as a flaw in our system of justice . . . [in which a] conviction by a court-martial, even for a minor crime (by civilian standards), usually carries with it a discharge from the service. Even a one-time first offender usually gets a punitive discharge. . . . In many cases where the servicemember has served over 20 years and thus is entitled to annual

retirement pay and medical benefits for life, the loss of these benefits is likewise automatic with a punitive discharge. This additional loss of benefits can well result in a loss of over a million dollars, depending on one's rank and length of service.").

Since the United States Court of Appeals for the Armed Forces is the court of last resort for all criminal cases prosecuted in the military justice system world-wide and service-wide, its rulings affect the several million United States citizens subject to the Uniform Code of Military Justice in Title 10 of the United States Code. Those who serve our country in uniform do not lose the protection of the Bill of Rights merely by accepting an enlistment or commission. This Honorable Court should exercise its supervisory role over federal courts under Rule 10(a) to ensure that the Eighth Amendment is made fully applicable to members of the military forces.[6] This is especially true given the reservations held by the Court of Appeals for the Armed Forces on this issue, as set out above.

Therefore, because this important question of federal law has not been, but should be, settled by this Court, this Honorable Court should grant the Petition for Writ of Certiorari.

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[6] Should this Court grant review and later declare the loss of military retirement benefits in this case an unconstitutional fine, on remand Captain Reed would not escape all punishment. Under military law, the sentence could be re-assessed by the Navy-Marine Corps Court of Criminal Appeals or the original convening authority, and could provide for a reasonable fine, a reasonable period of confinement, a written reprimand, or other type of sentence. See RULES FOR COURTS-MARTIAL 1107(d) and 1203(b).

CONCLUSION AND PRAYER

The Court of Appeals for the Armed Forces did not apply the appropriate legal tests to determine whether an unsuspended dismissal that results in a loss of over $700,000.00 in retirement benefits as a result of a court-martial conviction constitutes an excessive fine under the Eighth Amendment to the United States Constitution. This failure did not comport with decisions of this Court, nor those of other United States Courts of Appeals and a state court of last resort. This is an important federal question that has not been but should be decided by this Court. Captain Reed respectfully requests that this Honorable Court grant certiorari.

Respectfully submitted,

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Appendix A

UNITED STATES, *Appellee*,

v.

Rockey J. REED, Captain, U.S. Marine Corps, *Appellee*.

No. 99-0811

Crim. App. No. 97-1378

United States Court of Appeals for the Armed Forces

Argued April 5, 2000
Decided August 31, 2000

CRAWFORD, C.J., delivered the opinion of the Court, in which SULLIVAN, GIERKE, and EFFRON, JJ., joined. SULLIVAN, J., filed a concurring opinion. COX, S.J., filed a dissenting opinion.

Counsel

For Appellant: *Jack B. Zimmerman* (argued); *Terri R. Z. Jacobs* and *Lieutenant Commander L. J. Lofton*, JAGC, USN (on brief).

For Appellee: *Major Mark K. Jamison*, USMC (argued); *Colonel Kevin M. Sandkuhler*, USMC, and *Commander Eugene E. Irvin*, JAGC, USN (on brief).

Military Judge: D. P. Holcombe

Chief Judge CRAWFORD delivered the opinion of the Court.

Appellant was tried on April 16 and May 20-22, 1996, by a general court-martial, military judge sitting alone. The charges and specifications of which appellant was convicted were two specifications of making false official statements, in violation of Article 107, Uniform Code of Military Justice,

10 USC § 907, and one specification of larceny, in violation of Article 121, UCMJ, 10 USC § 921.

The military judge sentenced appellant to be dismissed from the service. On February 3, 1997, a post-trial session under Article 39(a), UCMJ, 10 USC § 839(a), was held. The convening authority approved the sentence, and the Court of Criminal Appeals affirmed the findings and sentence. 51 M.J. 559 (1999). We granted review of the following issues:

> I. WHETHER THE FINDINGS SHOULD BE SET ASIDE BECAUSE THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUSTAIN THE FINDINGS OF GUILTY.
>
> II. WHETHER THE FINDINGS SHOULD BE SET ASIDE BECAUSE THE FACTUAL-SUFFICIENCY ANALYSIS OF THE COURT OF CRIMINAL APPEALS WAS CLEARLY ERRONEOUS.
>
> III. WHETHER APPELLANT'S RIGHT TO BE FREE FROM AN EXCESSIVE FINE UNDER THE EIGHTH AMENDMENT WAS VIOLATED WHEN THE EFFECT OF HIS SENTENCE WAS THE LOSS OF $ 700,000 IN RETIREMENT BENEFITS FOR THE ALLEGED THEFT OF A $ 145.00 GOVERNMENT COMPUTER MODEM AND RELATED FALSE OFFICIAL STATEMENTS.

FACTS

Appellant was the Instructor-Inspector (I&I - the active duty cadre) of a Marine Corps Reserve Center (MCRC) in Wichita, Kansas. On November 1, 1994, the unit received a shipment of computer gear. The shipment came in a multi-pack box that contained two boxes of computer equipment. The multi-pack box was placed outside appellant's office. The shipping documents reflect that the MCRC in Wichita

received a printer, three boxes of software upgrades for Lotus Notes, and a Hayes Accura 144 + Fax modem. One box was factory sealed and contained only the printer. Appellant had the printer box moved to the administrative office where it was unpacked and the printer installed.

According to appellant's report, the second box was moved to his office. When appellant told Gunnery Sergeant (GySgt) Benford, a member of the I&I staff, to take the box out of appellant's office, it contained only the lotus notes - word processing software. The packing slip was missing. However, at some time, a packing slip and a DD Form 250, confirming delivery of a Hayes modem, showed up in GySgt Benford's files. When the missing modem first came to light, GySgt Benford was asked about the packing slip. GySgt Benford never remembered seeing a packing slip, but later the original packing slip appeared in his files without his knowledge. Appellant had unfettered access to GySgt Benford's office and on two occasions called GySgt Benford at home to inquire about how he locked his office door. This was unusual as appellant never had telephoned GySgt Benford at home before. Most significantly, appellant told GySgt Benford that if he implicated appellant in stealing the modem, it would be adversely reflected in the loyalty block of his performance evaluation.

The modem was not missed for 4 months, until March 1995. At this time, First Sergeant (1stSgt) Gregory W. Grizzle, U.S. Marine Corps, supply chief for the MCRC, requested a modem with a higher speed because the old modem took too long to download data. This request went through Marine Corps Reserve Headquarters in New Orleans, La. The reserve headquarters advised the MCRC that a faster modem was sent on November 1, 1994, along with an HP printer and Lotus Notes software. This led to a search for the modem.

Of the personnel assigned to the MCRC, only appellant remembered having seen an empty modem box which he thought had been discarded by reserves over a weekend. Despite an extensive wall-to-wall search of the MCRC, the modem was not found. No reserves remembered having seen a distinctive pink-colored modem box.

When appellant was first apprised of the missing modem, he did not appear to be upset, an unusual reaction for him. Appellant then brought a Hayes Accura modem, still in its packing box but with the serial numbers removed from the outside, into the office on loan until a replacement arrived. Appellant told several different stories as to how he came into possession of this modem. On one occasion he told the First Sergeant that he had bought the modem from a neighbor. On others he stated that he had purchased it from a retired Navy Chief who had happened to come by the reserve center.

After a search of the unit failed to produce the modem, appellant informed his battalion commander of the loss. He was directed to do an informal supply manual investigation. This lead to the false-statement charges.

On August 2, 1995, appellant set out to drive from Wichita to Charlotte, North Carolina, for training, arriving in Charlotte on August 4, 1995. On his way, and on August 2, 1995, appellant met with Major (Maj) Jeffrey S. Butter, U.S. Marine Corps Reserve, in Tulsa, Oklahoma. The meeting began at around 10:00 in the morning and lasted almost 2 hours.

On August 4, 1995, a package addressed to appellant arrived at the MCRC. The box was postmarked [**6] August 2, 1995, from Oklahoma City, Oklahoma. The box contained a Hayes modem with an anonymous note, which expressed an apology for taking the modem. Maj Butter gave the unopened box to appellant's wife. Both Mrs. Reed and

her daughter handled the box and the modem. On August 17, 1995, a Naval Criminal Investigative Service (NCIS) Special Agent picked up the box and its contents from appellant's wife. NCIS dusted the box, the anonymous note, and the modem for fingerprints. Although the box contained latent fingerprints, the modem contained no fingerprints at all. Appellant's wife strongly denied wiping the modem clean.

Trial counsel argued that appellant sent the modem to himself and manufactured an alibi that would put him in Tulsa, rather than Oklahoma City, on August 2, 1995. Maj Butter testified that it would be relatively easy to leave Wichita in the morning of August 2, 1995, drive to Oklahoma City, then to Tulsa, by 10:00 in the morning. This modem also had no serial numbers and the usual [*40] location of a serial number appeared to be scratched.

After appellant's conviction, but prior to acting on the sentence, the convening authority was apprised of a post-trial affidavit executed by Mr. Mickey R. Cambron, dated October 22, 1996. Mr. Cambron, a former Gunnery Sergeant, claimed in his affidavit that he had taken the modem and that he was the person who had anonymously mailed the modem. Based on this evidence, the convening authority ordered a post-trial Article 39(a), UCM.J., 10 USC § 839(a), session to inquire into the factual matters presented in Mr. Cambron's affidavit.

Mr. Cambron could not remember which hand he used to write appellant's address on the box mailed from Oklahoma City. Trial counsel requested Mr. Cambron to write appellant's address using his right hand and then his left hand. A comparison of the address written on the package mailed from Oklahoma City and Mr. Cambron's writing exemplars led the military judge to find that Mr. Cambron was not the person who addressed the box mailed from Oklahoma City. Mr. Cambron's testimony concerning the package and other matters was so inconsistent that the

military judge concluded that he "did not believe [Mr. Cambron's] testimony for one minute."

1. May 5, 1995, Statement

Appellant was directed to conduct a preliminary investigation into the loss of the modem by his immediate supervisor, Lieutenant Colonel (LtCol) Steffensen. Appellant completed his investigation and sent his conclusions to LtCol Steffenson on May 5, 1995. Appellant stated that UPS delivered two boxes of computer assets, and according to the packing list, I & I Wichita received an HP printer, a Hayes modem, and Lotus Notes software. Appellant stated that the box containing the printer was unpacked, but that the other box was opened, but not inventoried and "placed in the training/ISC office (next to, but not in a wall locker) [where it] remained. . . for approximately two months." This statement was the basis for the first false-statement charge. Master Sergeant (MSgt) Brahme, the training chief, testified that at no time was a box with computer assets stored next to the wall locker located in his office, the training office.

2. May 10, 1995, False Statement Regarding The Purchase of the Modem

When appellant's commanding officer learned that appellant brought a similar modem into the office, he appointed Captain (Capt) Hardy, USMC, to conduct an investigation. During that investigation Capt Hardy questioned appellant about the replacement modem he brought to the office. In his written statement, appellant claimed he bought a replacement modem from a retired Navy Chief Petty Officer he met at the MCRC in late February or early March 1995. This statement was the basis for the second false-statement charge.

Petty Officer Collins testified that he saw appellant talking to an older-looking man. He corroborated appellant's description of this person as not very well groomed. He,

appellant, and the older-looking man all smoked cigarettes together and discussed serving time on Guam. Petty Officer Collins went back into the office after smoking one cigarette and stayed for an additional half-hour before leaving for the day. Before Collins left, appellant came into his office and talked about Guam; he mentioned he had bought a modem. Appellant stated that the modem was in the back seat of the retired chief's vehicle. Petty Officer Collins testified the chief's truck did not have a back seat.

More importantly, appellant stated that this purchase occurred in late February or early March of 1995. This was refuted by Petty Officer Collins, who testified that the conversation occurred sometime in April. He was able to pinpoint the time because of a big snow storm in early March.

DISCUSSION

1. Issues I & II

Appellant argues that the lower court did not conduct a proper legal and factual-sufficiency analysis because (1) there is no direct evidence that appellant stole or wrongfully appropriated the modem; (2) the lower court did not adequately take into account appellant's good military character in accordance with United States v. Pond, 17 U.S.C.M.A. 219, 38 C.M.R. 17 (1967); and (3) the lower court did not consider Article 32, UCMJ, 10 USC § 832, testimony indicating that the model number of the modem received by the MCRC in November of 1994 was different from the replacement modem appellant brought to work in March of 1995.

Standard of Review

The test for legal sufficiency requires courts to review the evidence in the light most favorable to the Government. If any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Turner, 25 M.J. 324 (CMA 1987).

The test for factual sufficiency "is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses," the court is "convinced of the accused's guilt beyond a reasonable doubt." Turner, 25 M.J. at 325.

Viewed as a whole, we hold that the evidence is legally sufficient for a rational factfinder to find beyond a reasonable doubt that appellant stole the modem and then engaged in an elaborate cover-up after the modem was discovered to be missing, including making false official statements. We affirm the court below in finding the evidence to be legally and factually sufficient.

Larceny/Wrongful Appropriation

Appellant claims that there is no direct evidence that the modem was ever received or that appellant stole or wrongfully appropriated it. The record is, however, replete with sufficient circumstantial evidence.

With respect to the receipt of the modem, the evidence shows that a November 1, 1994, the MCRC received a shipment of computer gear in a multi-pack box. One box contained a printer; appellant had this box moved to the administrative office where it was unpacked and the printer was installed. According to appellant's report, the second box was moved into his office. When appellant told GySgt Benford to remove the box, it contained only Lotus Notes - word processing software. GySgt Benford testified that when he removed the box, he took it and locked it in a vault in his office.

Later, appellant was directed to conduct a preliminary investigation into the loss of the modem. As part of that investigation, appellant made a statement on May 5, 1995, that the box taken from his office was "placed in the training/ISC office (next to, but not in a wall locker) [where it] remained ... for approximately two months." However, MSgt Brahme, the training chief, testified that at no time was a box with computer assets stored next to the wall locker in his office, the training office. This statement was the basis for the first false-statement charge.

Although GySgt Benford never saw a packing slip in November 1994 when the boxes were delivered, in March, after it was discovered that the modem was missing, the packing slip and a DD Form 250, confirming delivery of the modem, mysteriously showed up in GySgt Benford's files, among other invoices. Appellant telephoned GySgt Benford at home on two occasions to ask how to open the lock on his office door. This was unusual as appellant never had telephoned GySgt Benford at home before. Of great significance is the evidence that appellant told GySgt Benford that if he implicated appellant in stealing the modem, it would be adversely reflected in the loyalty block of his performance evaluation.

When appellant was apprised of the missing modem in March 1995 by GySgt Benford, appellant took the loss with uncharacteristic calmness. Appellant claimed to have seen an empty modem box during a recent office move and claimed he told reservists to throw the box away. Shortly thereafter, GySgt Benford asked the reservists whether any of them had seen a modem box, but none had. Appellant also told GySgt Benford not to worry, that he had a modem at home that he bought from a neighbor and he would bring it in for office use. Appellant brought an apparently new modem into the office, still in its packing box. GySgt Benford examined the modem and the box for serial numbers, but found none.

Later, appellant claimed to have purchased the modem from a retired Chief Petty Officer who visited the MCRC in February 1995. Not only did the story change, but the date was disputed, placing the retired Chief Petty officer at the MCRC in March 1995, after the discovery of the missing modem. This contradicted appellant's wife's testimony that she saw the modem in their home in February and was the basis for the second false-official-statement charge.

To complicate matters further, on August 4, 1995, a package addressed to appellant arrived at the MCRC. The unopened box was given to appellant's wife. When opened, the box contained a Hayes modem, also with no serial number, and an anonymous note expressing an apology for taking the modem. Although both appellant's wife and his daughter handled the box and the modem, strangely enough, no latent fingerprints were found on the modem. Appellant's wife strongly denied wiping the modem clean.

The evidence also showed that on August 2, the date the package was mailed, appellant set out to drive from Wichita to Charlotte, North Carolina, for training. Also, on August 2, appellant met with Maj Butter in Tulsa, Oklahoma, at around 10:00 in the morning. Maj Butter testified that it would be easy to leave Wichita in the morning and drive to Oklahoma City and then to Tulsa by 10:00 in the morning. This evidence strongly supports the Government's contention at trial that appellant sent the modem to himself and manufactured an alibi that would put him in Tulsa, rather than Oklahoma City on August 2, 1995.

Even after trial, the saga continued. After appellant's conviction, but before acting on the sentence, the convening authority was apprised of a post-trial affidavit executed by a former Marine Gunnery Sergeant, Mr. Cambron. Mr. Cambron claimed in his affidavit that he had taken the modem and that he had anonymously mailed the modem and the note. Based on this evidence, the convening authority

ordered a post-trial Article 39(a) session to inquire into these assertions. By looking at handwriting exemplars the military judge concluded that Mr. Cambron did not address the box or write the note. Further, the military judge concluded that he did not believe Mr. Cambron's testimony.

In fact, the sum total of this evidence strongly supports the Government's trial theory that a modem was received, appellant stole it, and then engaged in an extensive cover-up that even extended post-trial.

Good Military Character

Essentially appellant argues that his good military character created a reasonable doubt at the appellate level and the finding must be set aside. Appellant reads Pond far too broadly. It is true that this Court noted in passing that good military character may be sufficient to create a reasonable doubt. See 17 U.S.C.M.A. at 227, 38 C.M.R. at 25. However, this Court set aside the finding of guilty because the law officer (now military judge) erroneously limited the defense in presenting its case at trial and failed to give the members an appropriate instruction on the credibility of the witnesses. We did not "compare[] the evidence of Lieutenant Pond's good military character to the Government's evidence . . ." as appellant asserts. Final Brief at 14.

Moreover, there is nothing in the language of Pond which requires a Court of Criminal Appeals to make a finding that such evidence is not cogent or irresistible. Additionally, Pond is overruled to the extent it is inconsistent with the test of Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). In fact, this Court has specifically held that a Court of Criminal Appeals need not specifically address all arguments raised by an appellant. In United States v. Matias, 25 M.J. 356 (1987), we stated that "we are aware of no requirement of law that appellate courts

in general or a court of military review [now the Court of Criminal Appeals] in particular must articulate its reasoning on every issue raised by counsel." 25 M.J. at 363. There is nothing in the opinion that would lead one to conclude that the lower court did not give each of appellant's assignments of error careful consideration or that it was unfamiliar with the record.

Article 32 Testimony

Appellant also sets up a straw man concerning the relevance of testimony at the Article 32, UCMJ, 10 USC § 832 hearing, concerning the make/model numbers of the modem stolen and the modem appellant brought to work. Appellant was charged with stealing the modem shipped. The fact that appellant brought a modem to work is relevant only in that it implicates appellant in the May 10 false official statement as to where appellant claimed to have obtained the modem he brought in to the office. Proof that the modem appellant brought to work is the same one stolen is not necessary.

Appellant argues the court below erroneously relied on United States v. Bethea, 22 U.S.C.M.A. 223, 46 C.M.R. 223 (1973), in rejecting the argument that information from the Article 32 investigation should be considered in evaluating guilt under Article 66, UCMJ, 10 USC § 866 (1994). In Bethea this Court held that for purposes of appellate review of issues at trial, the "record" refers only those matters introduced at trial. See 22 U.S.C.M.A. at 225, 46 C.M.R. at 225. Appellant argues that Bethea was decided at a time when "it was not clear that the Article 32 hearing included the right of the defense to cross-examine Government witnesses. See Final Brief at 26. He also asserts that Air Force, Army, and Coast Guard Courts of Criminal Appeals or their predecessor courts have all held that the appellate courts may consider information contained in the allied papers or the record. Id. at 25.

Appellant cites three cases in support of his argument: United States v. Rhodes, 40 C.M.R. 462 (ABR 1969); United States v. Strode, 39 M.J. 508 (AFCMR 1993), aff'd, 43 M.J. 29 (1995); and United States v. Hayes, 40 M.J. 813 (CGCMR 1994). However, examination of those cases shows that they do not support appellant's argument.

Rhodes predates Bethea. To the extent it held that the ABR could consider extrarecord matters in assessing guilt, it was overruled by Bethea.

Strode does not hold that information from the Article 32 investigation may be considered on appeal to determine guilt. The accused in Strode pled guilty to two sex offenses where the elements included knowledge that the victim was under the age of 16. He asserted that he had believed that she was over 16 when he committed the acts. In a footnote (n.3) the court gratuitously noted that the summarized statement of the OSI agent who interviewed the victim related that she looked more than 13 and could have been mistaken for a woman as much as 20 years of age. It observed that if admitted at trial, this statement would have been some support for the accused's position that he did not know the victim was not 16. It did not, however, rely on that statement to determine whether the accused's plea to committing indecent acts with a child under the age of 16 was improvident. Rather, it concluded that the accused's statement during the providence inquiry that he believed that she was more than 16 was inconsistent with the plea under Article 45, UCMJ, 10 USC § 845.

In Hayes, the Court of Military Review noted that it could consider a report of a Coast Guard investigator, admitted only at the Article 32, that the accused had asserted his right to counsel when confronted by an accusation of rape as a matter affecting his credibility. However, the holding of the court (by a bare majority of the sitting judges (3-2)) was grounded in the lack of credibility of the

prosecutrix, largely her failure to complain promptly about the alleged rape. 40 M.J. at 817. This is made very clear from the dissenting opinions that chastise the majority for its reliance on the lack of fresh complaint to conclude that the United States had not proven its case. Thus, Hayes does not provide support for appellant's argument, as reference to the Article 32 evidence was not required for the decision.*

Finally, it should be noted that in several cases, this Court has had the occasion to discuss the impact of Bethea. In each case we have concluded that matters outside the record of trial may not be considered. See, e.g., United States v. Thompson, 33 M.J. 218, 222 n. 5 (1991)(evidence "raised during testimony of one witness during" the Article 32 investigation which "was never asserted during any testimony at trial ... cannot be considered"); United States v. Harper, 21 M.J. 86 (1985)(government opposition to motion to attach and government motion to strike certain references in appellant's brief granted as information not included in record of trial) Therefore, appellant's argument that there is a split among the Courts of Criminal Appeals is incorrect.

ISSUE III

The Eighth Amendment provides: "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." The question presented is whether appellant's loss of retirement benefits as a result of his punitive discharge violates the Excessive Fines Clause of the Eighth Amendment. Appellant argues that his impending forfeiture of retirement pay is a direct result of the Government's punishment of him for a criminal offense and is therefore a fine under the Excessive Fines Clause. We disagree.

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* Moreover the Government did not seek review of the decision as it was grounded in a determination of fact.

At the time of trial, appellant had 19 years and 3 months of active duty service in the Marine Corps. Appellant would have been eligible to retire at age 41. He calculated, in his Clemency Request of November 6, 1996, that with a life expectancy of 72 years, the anticipated lifelong retirement pay he could have expected to receive as a retired Captain with over 20 years of service exceeded $700,000.

The recent Supreme Court case of United States v. Bajakajian, 524 U.S. 321 (1998), applies the Excessive Fines Clause. There the Supreme Court noted: "This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause." 524 U.S. at 327.

The offense of the accused in Bajakajian was attempting to leave the United States with $357,144 in currency, without reporting, as required by 31 USC § 5316(a)(1)(A), that he was transporting more then $10,000 in currency. The Government sought forfeiture of the $357,144 under 18 USC § 982(a)(1), which "provides that a person convicted of willfully violating" § 5316 "shall forfeit 'any property. . . involved in such offense.'" 524 U.S. at 324. The Court noted that § 982(a)(1) "descends" from a "historical tradition" of in personam, criminal forfeitures, historically considered punitive, 524 U.S. at 332, as opposed to "traditional civil in rem forfeitures," historically considered nonpunitive, id. at 331.

The Supreme Court, by way of a two-pronged analysis, first determined that there was a fine that fell within the Excessive Fines Clause and then determined that the fine was excessive. Because the forfeiture at issue in Bajakajian was a punitive criminal forfeiture, the Supreme Court noted: "The Excessive Fines Clause ... 'limits the government's power to extract payments, whether in cash or in kind, "as punishment for some offense."'" 524 U.S. at 328, 118 S.Ct at 2033, quoting Austin v. United States, 509 U.S. 602, 609-610, 113 S. Ct. 2801, 2805 (1993) (emphasis deleted). The

Court determined: "Forfeitures - payments in kind - are thus 'fines' if they constitute punishment for an offense." 524 U.S. at 328, 118 S. Ct. at 2033. After finding the forfeiture in that case to be a fine within the meaning of the Excessive Fines Clause, the Supreme Court then tested the fine to see whether it was "excessive." 524 U.S. at 334, 118 S.Ct. at 2036.

This Court touched on the Excessive Fines Clause in United States v. Sumrall, 45 M.J. 207 (1996), although the issue cited the Due Process Clause rather than the Excessive Fines Clause. In looking at a "related constitutional issue also arising in this case," we did not state that the expected forfeiture of pay due to the dismissal in Sumrall was "'an excessive fine' within the meaning of the Eighth Amendment[,]" but merely noted: "We find no excessive or disproportionate forfeiture as prohibited by the Eighth Amendment in these circumstances." 45 M.J. at 210.

In fact, the discussion in Sumrall is contrary to a determination that forfeiture of pay due to a dismissal is "an excessive fine" within the meaning of the Eighth Amendment. We stated in Sumrall that "there is no express authorization in the" UCMJ "or the Manual for Courts-Martial for the denial of retirement benefits." 45 M.J. at 208. Sumrall also explains that the question whether a punitive discharge, such as a dismissal, might automatically trigger a loss of retirement benefits is a matter of statutory law and that the "decision to retire an officer in appellant's grade and time in service rests by statute with his service Secretary." Id. at 208-09.

Because the denial of retirement benefits is not found in the UCMJ or the Manual, such benefits have historically been considered by military courts to be a collateral consequence of a sentence and not properly part of that sentence. See United States v. Lee, 43 M.J. 518, 520 (A.F.Ct.Crim.App. 1995)(stating that "it is indisputable that

it [loss of retirement benefits] is a consequence of the sentence and forms no part of the sentence itself" (emphasis in original)), aff'd, 46 M.J. 123 (1996); see also United States v. Quesinberry, 12 U.S.C.M.A. 609, 612, 31 C.M.R. 195, 198 (1962) (holding that the sentencing authority should concern himself "with the appropriateness" of the sentence "without regard to the collateral administrative effects of" a punitive discharge).

On the other hand, this Court has considered collateral matters, such as VA benefits and certain retirement considerations, to be relevant considerations on sentencing, but we have not held that collateral consequences constitute punishment. See, e.g., United States v. Stargell, 49 M.J. 92, 93 (1998) ("When, as in this case, an accused is 'knocking at retirement's door,' the impact of a punitive discharge on retirement benefits is not irrelevant or collateral."); United States v. Becker, 46 M.J. 141, 144 (1997)(the "impact of a punitive discharge on the benefits for an accused who is within weeks of becoming retirement eligible are [sic] of no less importance than that for a soldier who is eligible to retire" and "in both situations, the value of retired pay should be recognized as the single most important consideration in determining whether to adjudge a punitive discharge").

Nevertheless, historically, we have not found the loss of retirement benefits due to a punitive discharge to be punishment for an offense. Therefore, the first prong of the Bajakajian analysis fails because the loss of retirement benefits is not a fine within the meaning of the Excessive Fines Clause, so we need not reach the second prong, i.e., a determination of excessiveness. At issue is a civilian statute, and the decision to retire an officer rests with his service Secretary, not with a court-martial.

The court below determined appellant's sentence to a dismissal was appropriate. Although the sentence seems severe for larceny of $145 and two false official statements,

"this Court has expressly refused to evaluate the appropriateness of individual court-martial sentences, particularly in those cases where the court below exercised its unique factfinding powers under Article 66, ..., and determined the sentence was correct in law and fact." United States v. Maxwell, 45 M.J. 406, 427 (1996), quoting United States v. Olinger, 12 M.J. 458, 460 (CMA 1982), citing United States v. Dukes, 5 M.J. 71, 72-73 (CMA 1978).

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

SULLIVAN, Judge (concurring):

With regard to Issue III, I agree with the majority but wish to note that I remain convinced that a new option should be added to the list of possible punishments that a court-martial may consider a discharge with no or partial loss of retirement benefits. This new punishment option would allow better and more flexible justice in our military justice system. See, e.g., United States v. Sumrall, 45 M.J. 207, 211 n.3 (1996); see 45 M.J. 211A and 211B (appendix to Sullivan, J., dissenting).

COX, Senior Judge (dissenting):

As the majority notes, there is strong circumstantial evidence to support a belief that appellant received a modem, took it, then set up an elaborate scheme to cover up his theft. However, in order to convict a servicemember of an offense, it is axiomatic that the Government must prove each and every element of that offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

The elements of larceny are set out in Article 121, UCMJ, 10 USC § 921. Foremost among them is that the Government must prove that the accused took property from the possession of the owner. There is no proof in the record,

direct or circumstantial, that the Government was ever in possession of "the modem" allegedly stolen by appellant. Accordingly, no matter how suspicious the circumstances, the Government's proof of a larceny fails.

APPENDIX B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.

BEFORE

CHARLES Wm. DORMAN R.H. TROIDL
JOHN W. ROLPH

UNITED STATES

v.

Rockey J. REED, 441 60 4351
Captain (O-3), U.S. Marine Corps

NMCM 97 01378 PUBLISH
Decided 18 May 1999

Sentence adjudged 27 May 1997. Military Judge: D.P. Holcombe. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Marine Forces Reserve, 4400 Dauphine Street, New Orleans, LA.

LCDR LINDA J.LOFTON, JAGC, USN, Appellate Defense Counsel
JACK B. ZIMMERMANN, Civilian Defense Counsel
TERRI R.Z. JACOBS, Civilian Defense Counsel
LT JEFFREY K. VAN NEST, JAGC, USNR, Appellate Defense Counsel
Capt M.K. JAMISON, USMC, Appellate Government Counsel

DORMAN, Senior Judge:

A military judge, sitting as a general court-martial convicted the appellant, contrary to his pleas, of making two

false official statements and the theft of a facsimile modem, in violation of Articles 107 and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 907 and 921 (1994). As a result of this conviction, the military judge sentenced the appellant, who at the time of his trial had more than 19 years of service, to be dismissed from the United States Marine Corps. The convening authority approved the sentence.

We have carefully considered the record of trial, the appellant's five assignments of error, and the Government's response. We have also considered the excellent oral arguments of counsel presented before this court on 30 March 1999. We conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

Between November 1994 and May 1995 the appellant was the Inspector-Instructor [I&I] at the Marine Corps Reserve Center [MCRC] in Wichita, Kansas. As such, he was the senior Marine on site and the responsible officer for all equipment belonging to the MCRC. Working for the appellant was a contingent of about 12 other active duty Marines at the MCRC. In addition, the MCRC was the drill site of a reserve Electronics Maintenance Company, commanded by a reserve Marine major. In November 1994, the MCRC received a shipment from a computer equipment distributor that had been ordered for them by Marine Forces Reserve [MARFORRES] in New Orleans, LA. The shipping documents reflect that the shipment included a printer, Lotus Notes, and a Hayes Accura 144 + Fax 144 modem. The shipment came as a multipac box, containing two boxes that were placed outside the doorway of the appellant's office. One box was factory sealed and contained only the printer. The appellant had that box moved to the administrative

office where the printer was installed shortly after it was received. The second box was moved into the appellant's office. Prosecution Exhibit 18; Prosecution Exhibits 11 and 14. When the appellant had the second box removed from his office, it had already been opened. Record 295-297, Prosecution Exhibit 18. At that time, the second box contained only the Lotus Notes -- word processing software. None of the MCRC personnel recalled seeing the modem, or the distinctive pink box in which it was packed, at the time the shipment arrived or any time thereafter. Some, however, had seen the Lotus Notes.

During March 1995, the "admin shop" complained to the appellant about the speed of the electronic transmissions using their current modem. They also indicated that a faster modem was available from MARFORRES. The appellant tasked a member of the I&I staff, Gunnery Sergeant [GySgt] Benford, to procure a faster modem. Prosecution Exhibit 18. GySgt Benford contacted the MARFORRES G-6 office in New Orleans and was advised that a modem had already been shipped, and that it had come with the printer and the Lotus Notes. Record at 252, 302. GySgt Benford then searched through his files and found the shipping documents, Prosecution Exhibits 11 and 12, in his unsecured desk. He testified that he had not seen the documents prior to that time, and the documents had not been in the factory sealed box that contained the printer.

When GySgt Benford told the appellant that the MCRC was missing a modem, the appellant did not seem upset. The appellant's reaction surprised GySgt Benford because the appellant had become upset by less menial things in the past. The appellant told GySgt Benford that he had not seen the modem, but he had seen an empty modem box and that it had been discarded by the reserves over the weekend. He then told GySgt Benford not to worry about it because he had one at home that he bought from a neighbor. Shortly thereafter,

at a MCRC formation, it was determined that none of the Marines had seen the modem that had been shipped to the MCRC.

A wall-to-wall search of the MCRC was conducted, but the modem was not found. GySgt Benford checked with the Reservists to see if any of them had thrown away a modem box, and could not find anyone who had. The appellant then brought a Hayes Accura 144 + Fax 144 modem into the MCRC. The modem was contained in a shock box, a form-fitted box used for shipping that matches the shape of the modem. The appellant indicated that he was just loaning the modem to the MCRC until a replacement arrived. The serial numbers had been removed from the modem the appellant brought to the MCRC. The appellant told several members of the I&I staff that he had bought the modem from a neighbor.

Following a discussion with his Commanding Officer about the missing modem, the appellant conducted a preliminary investigation concerning its loss. The appellant completed this investigation and sent it to his Commanding Officer on 5 May 1995. Prosecution Exhibit 17. In the investigation, the appellant stated that the boxes had been stored in his office when they were received, but they were moved the following morning. The printer was installed in the administrative section the following day. He also stated that the other box was opened, but not inventoried and "placed in the training/ISC office, where it remained for approximately two months. This box was stored next to, but not in a wall locker." Prosecution Exhibit 17. As a result of his investigation, the appellant concluded that the modem had been stolen.

While conducting the investigation both GySgt Grizzle and GySgt Benford provided written statements. Both statements indicated that the appellant told them that he had

bought the modem he brought into the office from a neighbor. One statement indicated that the appellant had brought a Hayes Accura 144 + Fax 144 modem into the office in late March 1995. Neither statement indicated that the box containing the modem and the Lotus Notes had been placed in the training/ISC office. The appellant's preliminary inquiry did not indicate that he had brought a similar modem into the office, and it did not contain copies of the statements provided by GySgts Grizzle and Benford. The investigation was submitted in a letter format, however, and it was not unusual that there were no attachments.

When the appellant's Commanding Officer learned through other sources that the appellant brought a similar modem into the office, he appointed Captain Hardy, USMC, to conduct an investigation. During that investigation Capt Hardy questioned the appellant about the replacement modem he had brought into the office. In his written statement, the appellant claimed that he bought the modem from a retired Navy Chief he met at the MCRC in late February or early March 1995. Prosecution Exhibit 18.

Sufficiency of Evidence

In his first two assignments of error, the appellant argues that the evidence of record was factually and legally insufficient to support his conviction. The test for legal sufficiency requires this court to review the evidence in the light most favorable to the Government. In doing so, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, the evidence is legally sufficient. *Jackson v. Virginia*, 443 U.S. 307, 318-19; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Without question, with regard to both false official statements and the larceny, that standard is met in this case.

The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the accused's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. Reasonable doubt, however, does not mean the evidence must be free from conflict. *United States v. Lips*, 22 M.J. 679, 684 (A.F.C.M.R. 1986). "The factfinders may believe one part of a witness' testimony and disbelieve another." *United States v. Harris*, 8 M.J. 52, 59 (C.M.A. 1979). In resolving the question of factual sufficiency, we have carefully reviewed the record of trial, the arguments and briefs of counsel, and have given no deference to the factual determinations made at the trial level. Based on that review, we are convinced beyond a reasonable doubt of the appellant's guilt.

False Official Statements. The appellant stands convicted of having made two false official statements with the intent to deceive. The elements of that offense are: the appellant made an official statement; the statement was false in certain particulars; the appellant knew that it was false at the time he made it; and that the appellant made the statement with the intent to deceive. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ED.), PART IV, ¶ 31b. In order to affirm his conviction of these two offenses we must be convinced beyond a reasonable doubt of the elements with respect to each offense.

Specification 1 of Charge I alleges that a false official statement is contained within the appellant's preliminary investigation into the loss of the modem. The alleged false statement concerns the appellant's statement that the second box was "placed in the training/ISC office (next to, but not in a wall locker) the morning after the box was received by the unit and remained in the training/ISC office for approximately two months." Charge Sheet.

Numerous witnesses testified that they had seen a box of computer gear in the appellant's office during the relevant time period. GySgt Benford testified that the appellant asked him to move the brown multipac box containing the Lotus Notes out of the appellant's office one or two weeks after he first saw it in the appellant's office. There was no modem in the multipac box. GySgt Benford removed the multipac box from the appellant's office and he placed its contents [the Lotus Notes] in the vault. He testified that he did not place anything from the multipac box in the training office. GySgt Benford's recollection of the facts is corroborated by Master Sergeant Brame. He testified that he occupied the training office, an area of about 20 X 30 feet, between 1 November 1994 and the end of March 1995. During that time period no software was stored in the training/ISC office, next to the wall locker. No evidence was introduced to support the appellant's version that the gear had been stored in an unsecured area for several months. We find this evidence is both legally and factually sufficient to affirm this conviction.

Specification 2 of Charge I alleges that the appellant's statement to Capt Hardy, that he bought the modem he loaned to the MCRC from a former Navy chief, is false. Here, too, we find the evidence is both legally and factually sufficient to sustain his conviction for making that false official statement. We note that the appellant initially stated that he bought the modem from a neighbor, perhaps at a yard sale. We further note that the appellant's wife testified that she saw this modem in their home in February of 1995. Finally, the appellant's attempt to corroborate the purchase from the retired Navy chief was unsuccessful. The appellant referred Capt Hardy to a Navy recruiter, MS1 Collins, who also had an office in the MCRC. Capt Hardy interviewed MS1 Collins, but found that his recollection did not comport with the appellant's. MS1 Collins also testified at trial. He recalled standing outside and smoking a cigarette with the

appellant, a potential recruit, and an individual who identified himself as a retired Navy chief and who matched the scruffy appearance the appellant ascribed to him. MS1 Collins did not hear the "chief" offer anything for sale or even discuss computer equipment, and the appellant never indicated to MS1 Collins that he had gotten a good deal on a computer modem from the "chief". More importantly, MS1 Collins recalls that the meeting occurred well after the date alleged by the appellant, and after the period of time appellant's wife had already seen the modem in their home. MS1 Collins specifically recalled that meeting occurred after a snowstorm in March 1995, and also that it was light out at the time of the early evening meeting. Although MS1 Collins' recollection corroborates the existence of the "chief", it also eliminates him as the source of the modem the appellant brought into the MCRC.

Larceny. In order to sustain the appellant's conviction for the theft of the modem, we must be convinced beyond a reasonable doubt of each of the five elements of larceny. As they apply to this case, we must be convinced that the appellant took the modem, that it belonged to the United States, that is was worth $145, that the appellant intended to keep it, and that it was military property. MCM, Part IV, ¶ 46b(1). As appellant argues, this is a case based on circumstantial evidence. In general, findings may be based on circumstantial evidence, and specifically, the intent to steal can be so proved. RULE FOR COURTS- MARTIAL 918(C); MCM, PART IV, ¶ 46C(1)(f)(ii). We find the evidence presented in this case, coupled with the inferences that may be permissibly drawn therefrom, to be particularly compelling. Accordingly, we find that the evidence is both legally and factually sufficient to sustain the appellant's conviction for stealing the modem.

The appellant attacks the sufficiency of the evidence of larceny across a broad spectrum. He suggests that the

modem was never received by the MCRC. Appellant's Brief of 10 July 98 at 10-11. He also argues that there is no direct proof that he took the modem, or that the taking was with the intent to permanently deprive the Government of the modem. Appellant's Brief of 10 July 1998 at 11-12. He next argues that the Government's theory of the case is flawed because the modem the appellant brought to the MCRC in March 1995 is a different version of the modem that was shipped. Appellant's Brief of 10 July 1998 at 12-13. Citing *United States v. Pond*, 17 C.M.A. 219, 38 C.M.R. 17 (C.M.A. 1967),[1] he argues that the evidence of his good military character is sufficient to raise reasonable doubt in this case. Finally, the appellant asks a series of rhetorical questions concerning motive and his alleged behavior, suggesting that the answers to those questions also create reasonable doubt.[2] Appellant's Brief of 10 July 1998 at 15-17.

We have carefully considered each of the appellant's arguments, but find that the record provides more than enough testimonial, documentary and circumstantial evidence to sustain the appellant's conviction for the theft of the modem. The following evidence supports the findings

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[1] Appellant cited this case to us in his brief and during oral argument. While it generally stands for the proposition that evidence of good military character can be sufficient to create reasonable doubt, the Court of Military Appeals did not reverse *Pond* on that basis. Rather the reversal resulted from error committed by the military judge when he excluded relevant defense evidence and failed to instruct on the credibility of witnesses. Since the Court of Military Appeals returned the case to the board of review for reconsideration, sufficiency of the evidence was not the determining issue.

[2] Since neither motive nor the reasons why the appellant behaved as he did are elements of the offense of larceny, we need not speculate as to the appellant's motive, or to the answers to his rhetorical questions.

that the modem was received, that the appellant took it, and that he intended to permanently deprive the Government of its use:

> In early November 1994 a multipac box was received at MCRC. The packing list for the box indicated that the shipment contained a printer, Lotus Notes, and a modem. MARFORRES in New Orleans had ordered these items for the MCRC. Headquarters also ordered modems for other units, none of which reported a problem with the shipment.
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> When the shipment arrived at the MCRC it was placed in the appellant's office. The printer was soon thereafter installed in the admin section of the MCRC, but the second box of the multipac shipment remained in the appellant's office.
>
> When the second box was removed from the appellant's office it had already been opened. All that was in the box at that time were the Lotus Notes.
>
> When the appellant was advised that the MCRC was missing a modem he was, uncharacteristically, not upset, saying he had one at home that he could bring in.
>
> The modem appellant brought to the MCRC was virtually identical to the one that had been shipped. The serial number for the modem normally could be found at three locations: the bottom of the modem, on the box it was packaged in, and on the registration card inside the box. Although the modem appeared new, the serial numbers on the modem had been removed, and the appellant did not bring the registration card or the box to the MCRC.
>
> The appellant told the MCRC staff that the modem he brought in was just a "loaner".

> The appellant was apparently reluctant to conduct an investigation into the loss of the modem and did not do so until after he had spoken with his Commanding Officer.
>
> The appellant did not inform his Commanding Officer that he had brought a virtually identical modem into the MCRC.
>
> The appellant told differing accounts about where he had obtained the modem he brought to the MCRC.
>
> The appellant told differing accounts about what happened to the modem box he had seen in the MCRC. In one account he claimed he told a reservist to throw it away. The reservist testified that the appellant had not given him any such directions. In another account, the appellant claimed he took the distinctive "pink" modem box back to his office where he put it on his bookshelf and piled papers on top of it. Of all the Marines at the MCRC, only the appellant recalled seeing the box.

We find that the evidence of record establishes that the modem was received by the MCRC in early November 1994. The shipping documents and the modem were contained in the multipac box that was placed in the appellant's office. When the appellant asked that the box be removed from his office it had already been opened, and neither the modem nor the shipping documents were in the box. Clearly the appellant had the opportunity to remove the modem. When his staff finally discovered that a modem had been shipped to the MCRC, the appellant brought in a virtually identical modem, but then told different accounts concerning where he obtained the modem he was loaning to the MCRC. We find his statement that he was merely loaning that modem to the MCRC as proof of his intent to permanently deprive the

Government of the stolen modem. We also find his retention of the stolen modem until such time as it was discovered missing to also be evidence of larcenous intent. Finally we have also considered appellant's false official statements as evidence of his consciousness of guilt of larceny. *See United States v. Colcol*, 16 M.J. 479, 483 (C.M.A. 1983); *United States v. Jones*, 34 M.J. 889, 909 (C.M.R. 1992; and *United States v. Elmore*, 31 M.J. 678, 684-85 (C.M.R. 1990).[3]

Appellant also forcefully argues that the Government's case is undermined by the fact that the modem shipped to the MCRC in November 1994 was a different version of a Hayes Accura modem than the one the appellant brought to the MCRC in March 1995. Appellant bases this argument upon an exhibit contained in the Article 32, UCMJ, investigation, which is attached to the record of trial. He further argues that we should consider this evidence in our deliberations. In support of that position he cites *United States v. Hayes*, 40 M.J. 813, 814 n.1 (C.G.C.M.R. 1994). We have also found support for that position in *United States v. Strode*, 39 M.J.

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[3] The Government also presented evidence that a modem was anonymously mailed to the appellant. Along with the modem was a note explaining that the modem was mailed to appellant because the sender had heard that the appellant was in trouble, and that the modem was sent as a replacement for the one the sender had taken and broke. This modem was sent to the appellant from Oklahoma City, Oklahoma, and postmarked on a day that appellant had a meeting in Tulsa, Oklahoma. Although there was no evidence that the appellant was in Oklahoma City on the day the package was mailed, the Government established that it was about a 2-hour drive between Oklahoma City and Tulsa. The Government's theory, presented through argument, was that the appellant mailed this modem to himself. In our consideration of the record, we have given no weight to this evidence.

508 (A.F.C.M.R. 1993); *United States v. Norris*, 33 M.J. 635 (C.G.C.M.R. 1991); and *United States v. Rhodes*, 40 C.M.R. 462, 463-64 (A.B.R. 1969). Since none of these decisions are binding upon us, we decline to follow these decisions. Rather we will follow decisions from our superior Court, as well as our own precedent.

Subsequent to the Army Board of Review decision in *Rhodes* and the Court of Military Appeals cases cited therein, our superior Court pronounced the view that the Article 32, UCMJ, investigation ought not be consulted on appeal. In *United States v. Bethea*, 22 C.M.A. 223, 46 C.M.R. 223, 225 (1973), our superior Court wrote:

> Undeniably, evidence not presented at the trial cannot be used to support or reverse a conviction. Both the accused and the Government are entitled to challenge the admissibility of the evidence according to accepted rules of law; and each has a right to test the trustworthiness and the probative value of proffered evidence by cross-examination, and by other evidence. Different considerations apply to the sentence...we believe that the makers of the law intended that factual determinations germane to a finding on the merits should be based on evidence that has been exposed to cross-examination or the right to cross-examine.

The decision in *Bethea* has been followed by our superior Court on subsequent occasions. *See, e.g., United States v. Thompson*, 33 M.J. 218, 222 n.5 (C.M.A. 1991); *United States v. Armstrong*, 9 M.J. 374, 376 (C.M.A. 1980). Furthermore, Judge Wiss cautioned the Courts of Military Review that "[t]here are *some* places where even 'the

proverbial 800-pound gorilla"[4] is not free to roam." *United States v. Parker*, 36 M.J. 269, 273 (C.M.A. 1993)(citing *United States v. Bethea*, 22 C.M.A. 223, 46 C.M.R. 223 (1973)) (Wiss, J. concurring). See also *United States v. Hill*, 39 M.J. 712, 715 (C.M.R. 1993)(defining review of the "entire record" as a review of evidence presented at trial).

We, therefore decline the appellant's invitation to "roam" through the exhibits presented during the Article 32, UCMJ, Investigation. Furthermore, our determination that the appellant's guilt of larceny is established beyond a reasonable doubt is not dependent upon whether the modem the appellant brought into the MCRC in March 1995 is the same modem as that which was delivered to the MCRC in November 1994. Accordingly, we affirm the appellant's larceny conviction for the theft of the modem.

The Dismissal

In the appellant's remaining three assignments of error he challenges his dismissal. He argues that a dismissal is inappropriately severe and that it is unconstitutional because it is grossly disproportionate to the offenses of which he was convicted and because it is tantamount to an excessive fine.[5] In both constitutional arguments, he asserts a violation of the Eighth Amendment to the Constitution. We do not concur. We will first consider the appellant's two constitutionally based arguments.

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[4] Whether our powers are equated to an 800-pound gorilla, or that of "a big bear of a Court," as used by appellate defense counsel in this case, Judge Wiss' message is clear.

[5] For purposes of this argument we accept as fact appellant's assertion that as a result of his dismissal he would lose in excess of $700,000 in lifelong retirement pay, based on his normal life expectancy. Appellant's Brief of 10 July 1998 at 18. This information was not presented at trial.

As a standard of review, the appellant invites us to apply the criteria set out in *Solem v. Helm*, 463 U.S. 227, 291-292, 103 S.Ct. 3001, 3010 (1983) to determine the constitutionality of appellant's dismissal. We believe, however, that the Supreme Court has retreated from the broad application of the *Solem* criteria. *See Harmelim v. Michigan*, 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991). In *Harmelin*, Justice Scalia, joined by the Chief Justice, would only use the *Solem* criteria when reviewing death penalty cases. Three other Justices would apply Solem in other cases, but with the following limitation, "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime. *Id.* at L.Ed.2d 869(Kennedy, J. concurring)(quoting *Solem*, at 288, 303, 103 S.Ct. 3001, 77 L.Ed.2d 6370. *See also United States v. Maxwell*, 45 M.J. 406, 427 (1996).

We, therefore, base our review upon the following criteria. First, is the sentence grossly disproportionate to the crimes of which the appellant was convicted? Second, if that review leads to an inference of gross disproportionality, then it is appropriate to consider the appellant's sentence in relation to other sentences for similar crimes both within the military justice system and other criminal justice systems. *See Maxwell*, 45 M.J. at 406.

We have applied those criteria to the appellant and the facts of this case, and we do not find the sentence to be grossly disproportionate. Accordingly, we do not find that his sentence to a dismissal violates the Eighth Amendment.

We also find his dismissal does not violate the excessive fine proscription of the Eighth Amendment. *See United States v. Lee*, 43 M.J. 518, 520-21 (A.F.Ct.Crim.App. 1995). While the collateral consequences of the dismissal will result

in the loss of substantial retirement benefits, the sentence does not require the appellant to render any payment to the Government. The consequences of this sentence operate no differently than any other punitive discharge imposed upon an accused with vested or near vested retirement benefits. Furthermore, we are confident that the military judge who imposed the sentence was well aware of its collateral consequences.

We recognize that the review of the constitutionality of a sentence is distinct from a determination of whether a sentence is appropriate. While the sentence is constitutional, it still could be inappropriate. In support of his argument that his sentence to a dismissal is too severe, appellant relies upon his, admittedly, outstanding military record. Appellant's military record was so outstanding in fact that he was selected from the enlisted ranks to become a warrant officer, and then eventually a commissioned officer.

The appellant presented evidence that he is the sole source of financial support for his family, and that his family was counting on receiving his retirement income. He also presented evidence concerning the counseling needs for his 13-year old daughter, and that he and his wife planned to live near a military facility upon retirement to take advantage of his military benefits, to include continued counseling for his daughter. Both the appellant and his wife made clear that the appellant was needed at home. All this evidence was presented to the military judge prior to sentencing.

After trial the appellant submitted a substantial clemency package to the convening authority. In that request for clemency the appellant included 33 enclosures. Those enclosures further detail his daughter's medical problems and also further corroborate the appellant's outstanding service record. The convening authority

considered these matters, as well as the record of trial, prior to taking action in this case.

Regarding the issue of sentence appropriateness, the appellant essentially argues that his sentence to a dismissal is inappropriate due primarily to his outstanding military record, when compared to the relatively minor nature of his offenses. While we readily acknowledge the appellant's noteworthy military record, we do not find his offenses to be minor. At the time the appellant stole the modem from the MCRC he was the senior officer at that remote Marine Corps location. His unit needed the item he stole to better execute its mission. Once members of his unit discovered that the MCRC had received the modem, the appellant compounded his initial crime through deceit and falsehoods, first as an investigating officer and then as the subject of an investigation.

More is expected of a Marine officer than of enlisted Marines, and even more is expected of a Marine Officer who is the senior officer present. See *Parker v. Levy*, 417 U.S. 733, 744 (1974); *United States v. Means*, 10 M.J. 162, 166 (C.M.A. 1981). While the dollar value of the item stolen was rather insignificant the appellant's crimes were not, particularly so where many of his direct subordinates were aware of their senior officer's theft and deceit. For his crimes the appellant faced a maximum punishment that included confinement for 20 years, forfeiture of all pay and allowances, a fine, and a dismissal.

The military judge appears to have afforded the appellant the individualized consideration based on the "nature and seriousness of the offense and the character of the offender" to which he was entitled. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). This is particularly apparent, given the maximum sentence that the

military judge could have imposed, and the fact that the appellant did not exhibit either remorse or contrition. In this case we conclude that the appellant does not seek an appropriate sentence, he seeks clemency. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserved." *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). Clemency, however, is a not a judicial function at all, it is the prerogative of the convening authority. *Id.* at 395. In spite of the appellant's impressive clemency petition directed to the convening authority, clemency was not granted. We will not second-guess that decision. We are convinced that the sentence approved by the convening authority is appropriate in this case.

Conclusion

Following our careful review of this case, we affirm the findings and the sentence as approved by the convening authority.

CHARLES Wm. DORMAN

Senior Judge TROIDL and Judge ROLPH concur.

R.H. TROIDL

JOHN W. ROLPH